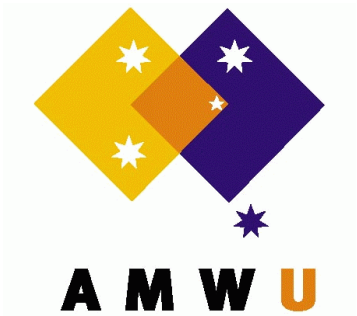
AUSTRALIAN MANUFACTURING WORKERS' UNION



SUBMISSION TO INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (A STRONGER SAFETY NET) BILL 2007

SENATE STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION

JUNE 2007

A. Introduction

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make submissions to the inquiry of the Senate Employment, Workplace Relations and Education References Committee (the Committee) into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 ("the Bill").

2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU represents approximately 130,000 workers in a broad range of sectors and occupations within Australia's manufacturing industry.

3. The AMWU supports the submissions to this inquiry of the Australian Council of Trade Unions (ACTU). In addition, the AMWU seeks to make additional submissions regarding a number of aspects of the Bill.

4. These aspects have been grouped together in the following headings:
   - Political and legislative approval of treating workers unfairly (p.3);
   - Government facilitation of the removal of minimum safety net entitlements without compensation (p.3);
   - Fair's fair? Application of the "fairness test" (p.5):
     - Non-monetary compensation (p.5);
     - Exceptional circumstances (p.7);
     - Calculating the monetary value of the entitlements that are removed (p.7);
     - The failure to incorporate the Australian Fair Pay and Conditions Standard (p.9);
   - The Workplace Authority: a law unto itself (p.9);
   - Weak protection for workers against employer exploitation (p.10).

5. Most people are aware of the cynical political motivation behind this Bill. After feigning surprise that workers are being disadvantaged by its Work Choices legislation, and reacting to wide spread public opposition to the legislation the Government now promises that its law will now be made fair by this amendment Bill. This Bill demonstrates just how hollow the government's promise is, unless the ideological underpinning of the act is changed, or the act is repealed,

working families will continue to experience or face the threat of exploitation, particularly in an economic downturn. The amendments continue to provide employers with the legislative support for systematic exploitation and unfair practices. This is achieved by defining fairness so narrowly that workers lose award safety net entitlements for no compensation, this Bill reveals just how contemptuous of workers rights the Government is. The proposed legislation is nothing more than the usual political crisis management, smoke and mirrors spin for the purpose of political survival. It should be recognised as such.

B. Political and legislative approval of treating employees unfairly

6. Under the proposed amendment to the Act, it is perfectly legal to treat a wide range of employees unfairly. Employees in the federal system who will not be covered by the so called "fairness" test include:
   (a) Employees on workplace agreements lodged before 7 May 2007.
   (b) Employees entering AWAs whose base salary is over $75,000.
   (c) Employees who the Workplace Authority determines work in industries or occupations not usually covered by awards (apparently even if the employee is covered by an award – see s.346E).[1]

7. In the AMWU's submission, *all* employees should have the benefit of the minimum safety net entitlements contained in an award. Providing unspecified compensation for the removal of minimum safety net entitlements diminishes workers rights and opens the door for exploitation. In the current political situation where the government is determined to remove workers rights them access to compensation is a poor and ineffective substitute for a robust and effective structure of award entitlements.

C. Government facilitation of the removal of minimum safety net entitlements without compensation

8. The proposed legislation defines "fairness" in a manner that is so narrow it would be laughable were it not so detrimental to workers who are being stripped of their

[1] It is not at all clear how the Workplace Authority will determine which industries and occupations are not usually covered by awards. Making such a determination must be surely be particularly problematic when it is not a matter of public record which employers are covered by awards due to a large number of employers being bound because they are members of an employers' association.

rightful award entitlements for little or no recompense. By limiting the test of fairness to a comparison of what happens to "protected" award conditions in proposed agreements, other important award safety net entitlements simply do not come into the equation. For this Government, it remains fair to remove a whole raft of those award rights without compensation.

9. A wide variety of allowable award matters that are not included in the "fairness" test (see s.513). These include:
    - Ordinary time hours of work and the time within which they are performed, notice periods and variations to working hours.
    - Ceremonial leave.
    - Leave for the purposes of seeking other employment after the giving of notice of termination by an employer to an employee.
    - Redundancy pay.

10. In addition to the currently "allowable" award matters, under the Work Choices legislation there remain rights contained in "preserved award terms" which continue to apply to employees bound by awards. These rights continue to apply to employees where their employer was respondent to an award before Work Choices.[2] Matters dealt with in preserved award terms are also not included in the "fairness" test. The matters include:
    - Annual leave
    - Personal / carers leave
    - Parental leave, including maternity leave and adoption leave
    - Long service leave
    - Notice of termination
    - Jury service
    - Superannuation

11. All of the above mentioned allowable award matters and preserved award terms can be removed from awards by workplace agreements under the so called "fairness test" for absolutely no compensation.

[2] Annual, personal/carer's and parental leave rights only apply where they are more generous than the Australian Fair Pay and Conditions Standard (see Division 3 of Part 10 of the Act).

12. This would mean, for example, that it is “fair” under the new fairness test to remove a right to paid maternity leave, which exists in a number of awards, without any compensation. It is also “fair” to remove any award right to redundancy pay.

13. Of course, only the type of government that introduced the unfair and extreme Work Choices legislation in the first place could think this is really fair.

D. Fair’s fair? Application of the “fairness test”

14. With rushed and ill-conceived laws, and poor execution of such legislation, this Government has again produced a Bill of impenetrable complexity. Its provisions, when applied, would necessarily deny fairness to workers. The “fairness test” is a test which requires an unreviewable bureaucracy to compare non-monetary entitlements which are valued subjectively by different employees and give them an arbitrary dollar value largely determined by the employer. Even when this approximation is implemented by that bureaucracy, the Bill allows employers further escape clauses, and abilities to manipulate future events to render the “fairness test” unsound and irrelevant.

Non-monetary compensation

15. One of the most serious failings of the fairness test is its treatment of non-monetary compensation in agreements and, in particular, how non-monetary benefits are to be assessed against the loss of pecuniary entitlements. This Government appears to be of the view that this will be quite straight forward in many cases, but the examples provided in their own explanatory memorandum are far from convincing.

Child Care

16. The example of child care is given in the explanatory memorandum as a non-monetary benefit that may constitute fair compensation for the loss of a relevant award entitlement. It is most unclear, however, how the value of child care is to be assessed. Child care costs for employees vary substantially depending upon the type of care, the age of the child or children, the number of children, the length of care required and the location of child care facilities. Further, will the government rebate on child care be taken into account? If so, in what way?

Clearly, the Workplace Authority would not be able to make an objective assessment of the cost of childcare in any particular case without extensive inquiries.

17. The situation is complicated enough for an individual agreement, but for a collective agreement, the individual circumstances of each employee would need to be assessed if an "overall effect" on employees under the agreement were to be assessed objectively (see s.346M). There is no legislative guidance as to how this will work in practice. The implementation of this test is left to the arbitrary determination of the unreviewable "Workplace Authority".

Car Spaces

18. The example of car spaces is also given in the explanatory memorandum as a non-monetary benefit that may be fair compensation for the loss of a relevant award entitlement. It is however, unclear how the Workplace Authority will objectively determine the parking costs of employees covered by an agreement. How is an assessor in Canberra, Melbourne or Sydney to accurately and objectively assess the parking costs in particular suburbs of another city at different times of the day or night? Will the assessor know the traffic volumes, levels of safety and crime rates, public transport options to and from home and work of employees in every town in the nation?

19. The different personal circumstances of employees in collective agreements cannot be reliably assessed - the situation is complicated enough for an individual agreement, but for a collective agreement, the individual circumstances of each employee would need to be assessed if an "overall" benefit to employees under the agreement were to be assessed objectively. The application of this legislation quickly descends into farce.

Flexible Working Hours

20. The example of an employee who puts a high value on leaving work early being one day a week being granted such a right is given in the explanatory memorandum as a non-monetary benefit that may be adequate compensation for the loss of a relevant award entitlement (page 18). Other examples are also given, including working from home and splitting shifts. How is the Workplace

Authority to objectively assess the subjective value of leaving work early on a particular day? What if this subjective value changes over time? How can subjective values be assessed in a collective agreement without extensive investigations by the Workplace Authority?

21. The Workplace Authority also lacks the ability to ensure that the valuation of such subjective "rights" are not manipulated, or that employees are not put under pressure to "agree" to certain valuations, assuming the employees are contacted at all.

Significant Value

22. To be considered adequate non-monetary compensation a benefit under an agreement must be of "significant value" to an employee. However, there is no satisfactory explanation of how the Workplace Authority is to assess what is of "significant value" to a particular employee or employees, other than the suggestion in the explanatory memorandum that it is "expected" that meals may not adequate compensation for the removal of award conditions. Arbitrary determinations by an unreviewable bureaucracy are again unfettered.

Exceptional Circumstances

23. The Bill provides that in "exceptional circumstances" the Workplace Authority may have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the employee when applying the fairness test. This creates a test with an enormous scope for uncertainty and abuse, particularly where there is no public hearing where evidence can be tested, little or no prospect of review on the merits of the decision and little or no prospect of the development of case law to guide the Workplace Authority on what may constitute exceptional circumstances.

Calculating the Monetary Value of the Entitlements That Are Removed

24. The manner by which the loss of an entitlement is to calculated under this Bill raises the inevitable spectre of manipulation. Under the "fairness test" the Workplace Authority would appear likely to look at the "usual pattern" of work as at the time of lodgement (see the examples in the Explanatory Memorandum at

pages 17 and 19). However, this could be most misleading. A “current pattern of work” will inevitably reflect the legal restrictions on hours of work, the penalty rates currently in force, and other rights and entitlements of the industrial instrument that currently applies to a group of employees.

25. If the Workplace Authority determines that a workforce which currently works Monday to Friday doesn’t lose very much because a new agreement removes weekend penalty rates – and that therefore wage rates need not increase much to be “fair compensation” for removing those penalty rates, that determination *may* accurately reflect work practices on the day of entering the new agreement. However, an employer may then restructure hours of work so that most or all of those employees now must work on weekends. Quite simply, the “fair compensation” is rendered anything but. As soon as an agreement removes, for example, the right to overtime or penalty rates on weekends or public holidays, there is then indisputably a much greater incentive for the employer to require an employee to work overtime, on weekends and on public holidays. However, if prior to making the agreement, the employee was not required to work overtime or weekends, these entitlements could presumably be “fairly” removed for little or no compensation. Even if the Workplace Authority is alive to the issue of possible departures from the “usual pattern” of work, such changes cannot be reliably estimated with sufficient certainty to allow the Workplace Authority to adequately determine what pecuniary future disadvantage an employee is going to suffer from the removal of the minimum safety net entitlements.

26. There is also an issue as to how some of the protected award conditions are to be converted into a monetary value. For example, the monetary value which should be attached to the right to take a rest break after a certain period of work is surely very difficult, if not impossible to determine. It must vary between employees depending on their personal circumstances and physical capacity. How is the loss of such a right to be objectively or even subjectively assessed? We note, in this context, there is not even a legislative obligation on the Workplace Authority to *ask* the employee about their view in relation to that valuation.

27. It is not an answer to say that these issues were also difficult under the former no disadvantage test – although this is undoubtedly true. At the very least, under the former no disadvantage test, collective agreements were subject to public

scrutiny by members of the Australian Industrial Relations Commission. As part of that process, members of the Commission held public hearings, had powers to hear evidence on oath, obligations to provide reasons for their decisions and were also subject to the discipline of an appeal process. In all of these respects, the "fairness test" is deficient.

The Failure to Incorporate the Australian Fair Pay and Conditions Standard

28. In a strange twist of language and law, what the Government has determined to be the "Australian Fair Pay and Conditions Standard" is not relevant to the Workplace Authority determining what is "fair" under its own "fairness test". If any element of this Bill was most emblematic that it this is legislation of spin and hollow language it is this: under the proposed amendments, an agreement can pass the fairness test while providing for wages that are less than those determined by the Australian Fair Pay Commission, and conditions that are less than those supposed to be "guaranteed" in the Act. The Workplace Authority is not even required to check whether the agreement they are assessing for "fairness" contains provisions that meet the Australian Fair Pay and Conditions Standard. Employers and employees should know where they stand. If an agreement passes a "fairness test", surely it should not undercut the Australian Fair Pay and Conditions Standard.

E. The Workplace Authority: a law unto itself

29. Under the proposed amendments, the Workplace Authority has a key role in applying the "fairness test". The Workplace Authority decides which agreements are "fair" and on what terms.

30. However, under the proposed amendments there appears to be no obligation to provide reasons why an agreement passes or fails the fairness test and no capacity for parties to seek review of the merits of the decision. Outside of very expensive challenges to the High Court, there would appear to be almost no capacity for public or private scrutiny of the Workplace Authority's decisions.

31. There is not even an *obligation* on the Workplace Authority to seek the views of the employees, or unions where they are a party to the agreements or a party to the relevant award, in relation to a variety of matters including the designation of

awards (s.346K) or indeed the estimates of various values under the fairness test itself (s.346M(6)).

32. Surely in 2007 it is beyond question that quality decision making and basic tenets of natural justice require greater accountability from the body charged with applying the fairness test.

F. Weak protection for workers against employer exploitation.

33. The Bill purports to prohibit an employer from dismissing an employee for the sole or dominant reason that an agreement fails, or may fail, the fairness test. If this Government is genuine about providing employees with a remedy for terminations relating to agreements failing the fairness test, it is difficult to understand why the prohibition contains the "sole or dominant" limitation. The "sole or dominant" proviso is surely a substantial and unnecessary limitation. If an employee is dismissed for reasons that include the reason that the employer was caught out trying to employ that worker under an "unfair" workplace agreement, surely that alone is sufficient to trigger legislative protection for that employee. Moreover, a genuine commitment to fairness would have access to relief through an unfair dismissal procedure that applies to all employees, rather than only through expensive legal proceedings in a court.

34. Interestingly, while employers who breach the fairness test will be obliged to pay back pay, there is no civil penalty associated with breaching the fairness test. This can be compared with the penalties which may apply to agreements containing prohibited content.

35. It surely says a lot about the Government's view of fairness when lodging an agreement that provides employees with rights to a remedy for unfair dismissal can attract penalties of up to $33,000, while lodging an agreement that removes payment for working public holidays, overtime and penalty rates requires only back pay.

G. Conclusions

37. This proposed legislation provides a “fairness test” with a myriad of ways for workers to be treated unfairly, and a Workplace Authority given no basis to be authoritative about what is or is not fair. Nonetheless review of the Authority’s determinations will almost certainly never occur. Legislation motivated by political expediency is the legacy of this Government, especially in employment and industrial law. The hubris of unfettered parliamentary control has only been checked by the Government’s horror at its standing in opinion polls. The purpose of this legislation is desperate spin, not true fairness for Australian workers: the misconceived “fairness test” ensures this.